

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own)	
Motion into the Appropriate Regulatory Plan)	
to succeed Price Cap Regulation for Verizon)	
New England Inc. d/b/a Verizon Massachusetts')	D.T.E. 01-31
intrastate retail telecommunications services)	
in the Commonwealth of Massachusetts)	

MOTION FOR CONFIDENTIAL TREATMENT

Verizon Massachusetts ("Verizon MA") requests that the Department, in accordance with Mass. General Laws c. 25, § 5D and the Department's Ground Rules in this proceeding, grant this Motion to provide confidential treatment of data that Verizon MA provided to the Department in the proprietary portions of the Rebuttal Testimony of Robert Mudge and Michael Doane (with associated attachments), filed on September 21, 2001, and its response to Information Request NEPCC-VZ 2-6, filed on September 18, 2001. As shown below, the data qualify as "trade secret" or "confidential, competitively sensitive, proprietary" information under Massachusetts and federal law and are entitled to protection from public disclosure in this proceeding.

ARGUMENT

In determining whether certain information qualifies as a "trade secret,"¹ Massachusetts courts have considered the following:

¹ Under Massachusetts law, a trade secret is "anything tangible or electronically kept or stored which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information design, process, procedure, formula, invention or improvement." Mass. General Laws c. 266, § 30(4); *see also* Mass. General Laws c. 4, § 7. The Massachusetts Supreme Judicial Court, quoting from the Restatement of Torts, § 757, has further stated that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors.... It may be a formula treating or preserving material, a pattern for a machine or other device, or a list of customers." *J.T. Healy and Son, Inc. v. James Murphy and Son, Inc.*, 260 N.E.2d 723, 729 (1970). Massachusetts courts have frequently indicated that "a

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken by the employer to guard the secrecy of the information;
- (4) the value of the information to the employer and its competitors;
- (5) the amount of effort or money expended by the employer in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Jet Spray Cooler, Inc. v. Crampton, 282 N.E.2d 921, 925 (1972).

The protection afforded to trade secrets is widely recognized under both federal and state law. In *Board of Trade of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905), the U.S. Supreme Court stated that the board has “the right to keep the work which it had done, or paid for doing, to itself.” Similarly, courts in other jurisdictions have found that “[a] trade secret which is used in one’s business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it, is private property which could be rendered valueless ... to its owner if disclosure of the information to the public and to one’s competitors were compelled.” *Mountain States Telephone and Telegraph Company v. Department of Public Service Regulation*, 634 P.2d 181, 184 (1981).²

trade secret need not be a patentable invention.” *Jet Spray Cooler, Inc. v. Crampton*, 385 N.E.2d 1349, 1355 (1979).

² See also, e.g., *Investigation into Appropriate Regulatory Plan for Verizon*, DTE 01-31, Hearing Officer Ruling (September 14, 2001) at 8 (“I determine that Verizon has neither violated 47 U.S.C. § 222(b), nor has Verizon been unreasonable in its refusal to disclose to parties in this proceeding third-party specific information in Verizon’s province, without authorization from the third-parties involved. This has been the prior practice in this proceeding and in other Department proceedings.”) and Hearing Officer Riling (August 29, 2001) at 3 (“I agree with VZ-MA that its response to AG-VZ-1-8 involves third-party specific data which could jeopardize the competitive position of a service provider who is not a party to this proceeding. Unless RCN waives protection and grants VZ-MA permission to publicly disclose this information, I grant VZ-MA’s Motion to treat the materials submitted attached to AG-VZ-1-8 as

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 et seq., provides further protection for the confidential and proprietary information of telecommunications customers and carriers. *See* 47 U.S.C. § 222. Among other things, § 222 protects both customer proprietary network information and the confidentiality of proprietary carrier data.³

The proprietary portions of the Rebuttal Testimony of Robert Mudge and Michael Doane (with associated attachments) display Verizon MA's confidential retail data and its estimate of the level of competition that it is experiencing in the Massachusetts telecommunications market. The competitive profiles were set forth on a disaggregated basis for every central office within the Commonwealth. All of the material in the profiles are highly proprietary. Protective

confidential, proprietary materials.”); *Bell Atlantic's Tariffs Nos. 14 and 17*, DTE 98-51, Hearing Officer Ruling (November 5, 1999) at 5 (ruling that “the number of plain old telephone service (POTS) lines each carrier has in each central office should avoid public scrutiny.”); *Bell Atlantic's Local Service Provider Freeze*, DTE 99-105, Hearing Officer Ruling (April 20, 2000) (protecting carrier data regarding ordering volumes); *Bell Atlantic's Local Service Provider Freeze*, DTE 99-105, Hearing Officer Ruling (April 20, 2000) (protecting carrier documents relating to (i) internal procedures implementing, removing or responding to local service provider freeze and (ii) information containing customer service and marketing information regarding success or failure at overcoming service provider freezes).

³ Section 222(f)(1) defines “customer proprietary network information” in relevant part as:

(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier.

In addition, §§ 222(a) and (b) provide:

(a) **IN GENERAL.**—Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, equipment manufacturers, and customers, including telecommunication carriers reselling telecommunications services provided by a telecommunications carrier.

(b) **CONFIDENTIALITY OF CARRIER INFORMATION.**—A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

treatment is appropriate to preserve the competitive interests of all telecommunications service providers in the state, including Verizon MA.⁴

Specifically, Section A of the profiles contains a summary of business and residence data for retail, resale, UNE-P and E911 lines at the central office level. Section B contains Verizon MA retail, resale and UNE-P line data for January 2001 and a broader array of data for May of 2001 (*see* footnote 4 below). This section also contains a listing of every active competitor operating in each central office and a detailed matrix that displays the categories of services provided by those competitors. Section C of the profiles contains a summary of services that each active competitor represents that it provides in the Commonwealth.

The data are the confidential and proprietary information of Verizon MA and third-party competitive providers that should not be disclosed publicly for reasons set forth in Hearing Officer rulings in other instances in this proceeding. In addition, Verizon MA may not disclose the third-party data of competitive providers – most of whom are not parties to this docket – without the carriers’ authorization. In light of the Hearing Officer’s ruling of September 14, 2001, however, all relevant information is being provided to the Department and to those parties that execute a mutually acceptable protective agreement.

The attachment to Verizon MA’s response to Information Request NEPCC-VZ 2-6 provides a list of resellers of public access line (“PAL”) and public access smart lines (“PASL”) in Massachusetts. The list also identifies the number of PAL and PASL lines that each such provider resells in the state. The data are the confidential and proprietary information of the

⁴ The profiles were assembled by accumulating the following access line data:

- a) The number of residence and business retail lines provisioned by Verizon MA.
- b) The number of residence and business lines provisioned by resellers using Verizon MA facilities.
- c) The number of facilities-based residence and business lines provisioned by competitors using UNE-P Verizon MA facilities.

third-party competitive providers that Verizon MA may not disclose without the resellers' authorization, for reasons set forth in Hearing Officer rulings in other instances in this proceeding. In light of the Hearing Officer's discovery ruling of September 14, 2001, however, the information is being provided to the Department and to those parties that execute a mutually acceptable protective agreement.

The information for which VerizonMA is requesting protective treatment is compiled from internal databases that are not publicly available, is not shared with any non-Verizon employees for their personal use, and is not considered public information. Any dissemination of this information to non-Verizon employees, such as contracted service providers, is labeled as proprietary. Further, any non-Verizon employees who are working for Verizon and may have access to this information are under a non-disclosure obligation.

VerizonMA employees that have access to the relevant data are similarly subject to non-disclosure requirements. For example, employees who use this information during the course of their responsibilities are not permitted to publish the relevant data for general public use or release them for publication by others to the general public. Moreover, when these data are transferred internally they are transferred over a protected network and are marked proprietary. As explained below, public disclosure of the requested information could create a competitive disadvantage for VerizonMA and the relevant carriers, and be of value to other providers in developing competing market strategies.

The requested data represent valuable commercial information that competitors could use to frustrate VerizonMA and competitor efforts in the competitive market. For example, underscoring the confidential and competitively sensitive nature of the data, VerizonMA sales and marketing personnel are not provided access to the third-party information contained in the

d) The number of facilities-based residence and business lines provisioned by competitors using competitor-provided facilities.

proprietary portions of the Rebuttal Testimony (and associated attachments) for the purpose of competing against other providers. The data could be useful to Verizon MA retail representatives (and other competitors that seek to scrutinize Verizon MA's like proprietary information) by allowing them to know *which* services warrant greater sales and marketing resources and, correspondingly, which may not. Disclosure of such information inappropriately tips the competitive balance by permitting competitors to target Verizon MA (and other competitors') customers to gain a competitive advantage in the marketplace that they otherwise would not enjoy. In balancing the public's "right to know" against the public interest in an effectively functioning competitive marketplace, the Department should continue to protect information that, if made public, would likely create a competitive disadvantage for the party complying with legitimate discovery requests.

In short, the information is not readily available to competitors and would be of value to them in developing competitive marketing strategies. Competitive disadvantage is likely to occur if the confidential information is made public – solely as a result of regulatory oversight.⁵ The benefits of nondisclosure, and associated evidence of harm to Verizon MA (and the relevant carriers), outweigh the benefit of public disclosure in this instance. By releasing this information to the public, competitive companies will be able to determine characteristics of Verizon MA's and the carriers' market segments and will have the ability to utilize this information in developing particular offerings in direct competition with Verizon MA and the carriers. Historically, both the Department and the telecommunications industry have recognized such information to be confidential and appropriately subject to protection by order and the execution of reasonable nondisclosure agreements. Nothing has changed in terms of law or circumstance that warrants an abandonment of that protection. Given the increasingly competitive

⁵ If Verizon MA were not a regulated entity, the relevant information would not be available for public inspection.

telecommunications world, the Department should not now depart from its past practice and apply G.L. c. 25, §5D to permit competitors to gain access to what is private, commercial information. Disclosure of the competitively sensitive material will undermine VerizonMA's ability to compete with other providers of like services that are not subject to equal public scrutiny.

CONCLUSION

WHEREFORE, VerizonMA respectfully requests that the Department grant this Motion to afford confidential treatment to all data contained in the proprietary portions of the Rebuttal Testimony of Robert Mudge and Michael Doane (with associated attachments) and its response to Information Request NEPCC-VZ 2-6. As demonstrated above, the information is entitled to such protection, and no compelling need exists for public disclosure in this proceeding.

Respectfully submitted,

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